Supreme Court, U.S.
FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1872.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

CONSOLIDATED RAIL CORPORATION,
PETITIONER,

v.

HALLAMORE MOTOR TRANSPORTATION, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Brief in Opposition to Petition for Certiorari.

ZACHARY R. KAROL,*
WILLIAM N. BERKOWITZ,
BINGHAM, DANA & GOULD,
100 Federal Street,
Boston, Massachusetts 02110.
(617) 357-9300
Counsel for Hallamore Motor Transportation, Inc.
** Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

29pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT

I. The Decision by the Massachusetts Supreme Judicial Court is Not in Conflict with Applicable Decisions of this Court. 3

II. The Decision by the Massachusetts Supreme Judicial Court is Consistent with Decisions of Other State Courts of Last Resort and of Federal Courts of Appeals. 12

III. The Decision by the Massachusetts Supreme Judicial Court does not Bar Conrail from Collecting Freight Charges. 19

CONCLUSION 24

TABLE OF AUTHORITIES

CASES:

Chicago & Northwestern Transp. Co. v. Krohn Cortage Co., 79 Wis.2d 39, 255 N.W.2d 310 (1977) 17, 18

Consolidated Freightways Corp. of Delaware v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971) 12, 15, 16,

L & N R.R. v. Central Iron Co., 256 U.S. 59 (1924) passim

Lyon Van Lines v. Cole, 9 Wash. App. 382, 512 P.2d 1108 (1973) 15

Middle Atlantic Conference v. United States, 353 F.Supp. 1109 (D.D.C. 1972) 20, 22n

Payment of Detention Charges, Eastern Central States, 335

I.C.C. 537 (1967), aff'd sub nom. Middle Atlantic Conference v. United States, 353 F.Supp. 1109 (D.D.C. 1972) 20, 21

Pittsburgh, Cincinnatti, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577 (1919) passim

Roll Form Products, Inc. v. All State Trucking Co., 662 F.2d 150 (2d Cir. 1981) 14, 15

STATUTES:

49 U.S.C. §323 12, 13, 16, 22n

49 U.S.C. §§501--11917 passim

49 U.S.C. §10744 9n, 10n

SUMMARY OF ARGUMENT

The decision below by the Massachusetts Supreme Judicial Court, that liability for freight charges is to be determined by principles of common law rather than the Interstate Commerce Act, does not conflict with any holding of this Court. The decisions of this Court cited by petitioner do not purport to interpret the Interstate Commerce Act as imposing liability on any particular party. On the contrary, these cases suggest that liability is to be determined with reference to ordinary contract principles.

Furthermore, the decision by the Massachusetts Supreme Judicial Court is

consistent with decisions rendered by lower federal courts and state courts of last resort. The courts in these cases, faced with determining liability for freight charges, held that such decisions should be made solely with reference to common law principles.

Finally, the Massachusetts decision does not bar the petitioner from collecting freight charges from other persons not parties to this action. These persons may be liable to petitioner on a variety of theories which petitioner may freely pursue.

ARGUMENT

I. The Decision by the Massachusetts Supreme Judicial Court is Not in Conflict with Applicable Decisions of This Court.

The narrow federal question presented for review is whether the liability of Hallamore Motor Transportation, Inc. ("Hallamore") for freight charges is determined with reference to the provisions of the Interstate Commerce Act, 49 U.S.C. §501-11917 (1982 ed.) (the "Act"), or with reference to common law principles.[1/] The holding of the

---

[1/] Accordingly, Hallamore does not address herein the separate, state law question whether, under common law principles, Hallamore should have been held liable.

Massachusetts Supreme Judicial Court ("SJC") that common law principles govern did not conflict with any holding of this Court.

Consolidated Rail Corporation ("Conrail") maintains that the SJC reached a decision in direct conflict with this Court's holdings in Pittsburgh, Cincinatti, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577 (1919) ("Fink") and L&N R.R. v. Central Iron Co., 265 U.S. 59 (1924) ("Central Iron"). However, in neither Fink nor Central Iron did this Court purport to decide the question of whether a consignee's liability is determined, in the first instance, under the Act or under common law principles. In Fink, the issue was whether a consignee who

in fact purported to make full payment of freight charges could later be required to pay the higher legal rate, after it was determined that the carrier in fact had undercharged him. The Court examined the purpose of the Act, which, it concluded, was to avoid discrimination by providing "one rate for all shipments." 250 U.S. at 581. It held that, in light of this purpose to establish a single uniform rate, the consignee's initial payment of the charges demanded "amounted to an assumption on the part of [the consignee] to pay the only legal rate the carrier had the right to charge or the consignee the right to pay." Id. at 582. Thus, the Court in Fink did not address the question of whether the Act itself imposes liability in the first in-

stance. It held only that a consignee who assumes an obligation to pay freight charges by making what is later determined to be a partial payment thereby assumes liability to pay "the only legal rate." Id.

Any conceivable doubt about the holding in Fink was certainly eliminated in Central Iron. There, the Court held that a shipper was not liable for freight charges in the absence of an express or implied contract between the shipper and the carrier. The Court noted that the tariff established under the Act "did not provide . . . by whom payment should be made." 265 U.S. at 66. It further noted that delivery of goods to the carrier does not necessarily, "under general law," import a "promise" to pay freight charges. Id.

at 67. Indeed, the Court's entire discussion of the issue of the shipper's liability was couched in terms of contract (express and implied), agreement and promise. Id. at 66-68. For example, the Court stated that the "carrier and shipper were left free to contract, subject to the rule which prohibits discrimination," id. at 66; that "the contract may provide that the shipper agrees absolutely to pay the charges," id.; that the Court's task was to "determine what promise, if any, to pay freight charges was, in fact, made" by the shipper, id. at 67; that a shipper is presumptively liable because "a promise by him to pay . . . is inferred" when the transportation is ordered on his behalf, id.; that this inference may be rebutted "as in the

case of other contracts," id.; and that, upon an examination of all pertinent facts, "the trial court was justified in finding that [the shipper] did not assume the primary obligation to pay the freight charges." Id. at 68. Indeed, even in the very sentence quoted by Conrail in its Petition for Certiorari, at 8, in a clause omitted from that quotation, the Court stated that no contract of the carrier could "release from liability a shipper who had assumed an obligation to pay the charges." Id. at 65. (Emphasis supplied.) In short, Central Iron made it entirely clear that courts should look to principles of contract law rather than to the Act to determine whether a shipper is liable for the payment of freight charges. There is certainly no

reason why a different analysis should be applicable to the determination of the consignee's liability.[2/]

[2/] As presently worded, the Act provides that, when the carrier is instructed to deliver property to a consignee who is an agent only, "the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates that may be found to be due after delivery," if the consignee gives certain notice. 49 U.S.C. §10744. This provision, which was initially enacted in 1927, after Fink was decided, was clearly intended to be a remedial provision to enable agent-consignees who make partial payment to protect themselves from what would otherwise have been the automatic application of the holding in Fink. By use of the phrase "for which the consignee is otherwise liable," Congress clearly expressed its intention not to expand the consignee's liability beyond what it had been under Fink, before the Act was amended. Thus, the language added by the 1927 amendment surely does not require that a different analysis be used to determine the liability of a shipper

(Footnote Continued On Next Page)

To the extent that the Court in Central Iron addressed the question of the consignee's liability, it did so in dictum, but that dictum did not conflict at all with the holding in Fink or in Central Iron itself. The Court stated, "For, under the rule of the Fink Case, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not

---

[2/](Footnote Continued From Previous Page)

than the one which is to be used to determine the liability of a consignee who, like Hallamore, has not made a partial payment of "rates billed at the time of delivery." 49 U.S.C. §10744.

until later." 265 U.S. at 70. This statement was made in the context of an express agreement by the consignee to pay the charges, id. at 64, and, as in Fink, the consignee had made a payment, at the time of delivery, of charges which were later discovered to be less than the lawful amount. Because the consignee had expressly agreed to pay and because it in fact did pay the amount demanded at the time of delivery, it assumed an obligation to pay "the full amount" by accepting the shipment.

Thus, the SJC properly construed prior decisions of this Court in holding that common law principles of express and implied contract govern the initial determination of a consignee's liability.

II. The Decision by the Massachusetts Supreme Judicial Court is Consistent with Decisions of Other State Courts of Last Resort and of Federal Courts of Appeals.

The foregoing analysis of Fink and Central Iron is fully supported by two federal courts of appeal. In Consolidated Freightways Corp. of Delaware v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971) ("Consolidated Freightways"), which involved the analogous provisions of the Motor Carrier Act, 49 U.S.C. §323, the defendant was designated as the consignee on the bills of lading which, as in the present case, designated a third party as the party to be billed for freight charges. The court held for the defendant, stating:

> [(P)laintiff] . . . strenuously urges that Section 223 of the Motor Carrier Act (49

> U.S.C. §323) imposes absolute statutory liability upon the consignee . . .
>
> We discern nothing in the language or policies of Section 223 to suggest that Congress intended to impose absolute liability upon a consignee for freight charges. . .

Id. at 60-61.

The court then carefully reviewed the fifty year history of the statute and cases decided under it, including Fink and Central Iron, and concluded:

> The undercharge cases are thus consistent with and, indeed, support our conclusion that Section 223 was not intended to fashion a rigid liability upon a consignee. Congress left the initial determination of a party's liability for freight charges to express contractual agreement or implication of law . . . .
>
> So long as payment of the full tarriff charges may be

> demanded from some party, the anti-discrimination policy of the Section is satisfied.

Id. at 62.

The Second Circuit Court of Appeals reached the same conclusion in Roll Form Products, Inc. v. All State Trucking Co., 662 F.2d 150 (2d Cir. 1981) ("Roll Form"). In Roll Form, defendant asserted a right under the Act to pursue consignee-customers of a Chapter XI debtor for freight charges, even though all freight had been shipped under documents showing the freight had been prepaid by the debtor. The court denied liability, on the ground that the Act was intended to eliminate rate discrimination, not to assign liability to any particular party to a shipping transaction. The court stated:

> The Act, in our view, was not intended to "fashion a sword" to insure collection by carriers of freight charges. Nor do we think the Act was intended to impose an absolute liability upon consignees of freight charges. Its sole purpose was "to secure equality of rates to all and to destroy favoritism." . . . . Accordingly, in the absence of discriminatory practices, we agree with the Seventh Circuit [in Consolidated Freightways] that "Congress left the initial determination of a party's liability for freight charges to express contractual agreement or implication of law." (Citations omitted.)

662 F.2d at 154.

Similarly, modern decisions by state courts recognize that the Act does not impose absolute liability on consignees or on any particular party. In Lyon Van Lines, Inc. v. Cole, 9 Wash. App. 382, 512 P.2d 1108 (1973), the carrier sought to collect freight

charges associated with the move of defendant's household belongings to his new place of employment. Defendant's employer had agreed to be responsible for the moving expenses, but defendant had been named as consignee. After a review of several federal decisions, including Fink, Central Iron, and Consolidated Freightways, the court denied recovery. The court stated:

> In Consolidated Freightways, the court offered a distinction between the imposition of liability for freight charges and the furtherance of the antidiscriminatory purposes of 49 U.S.C. §323. The court noted that in Fink and its progeny, the Supreme Court ascertained which party was liable for the freight charges independently of its consideration of whether the statutory requirements that the full tariff rate be charged were met. In other words, the

> concern manifested in Fink was to insure that equal rates at the full legal level were charged by all common carriers, rather than to determine who was to pay such charges in every case. (Emphasis in original.)

512 P.2d at 1112.

Chicago & Northwestern Transp. Co. v. Krohn Cartage Co., 79 Wis.2d 39, 255 N.W.2d 310 (1977), is also consistent with the foregoing analysis. There, a consignee who "accepted" a small portion of a shipment was held liable for freight charges on that portion only, but not for charges associated with a much larger portion of the entire shipment. The court stated:

> Merely being named as consignee of the shipment in the absence of an express contract or in the absence of conduct which will, by implication, impose liability does not subject a consignee to the obligation to pay the freight charges.

255 N.W.2d at 313.

The court then considered more closely the question of the nature of the conduct which, in the absence of an express agreement, will suffice to impose liability on the consignee. Since the consignee had actually received a portion of the shipment at its own facility, it was liable, presumably under a theory of implied contract, for freight charges only on those goods which it received. Since the court looked to the conduct of the consignee to determine whether it had exercised dominion and control over the property rather than to the Act itself, its analysis was consistent with the view of the SJC and with prior decisions of this Court that liability is determined

with reference to ordinary contract principles.

III. The Decision by the Massachusetts Supreme Judicial Court Does Not Bar Conrail from Collecting Freight Charges.

Conrail erroneously argues that the SJC's decision bars it from recovering freight charges from any entity. In making this argument, Conrail seriously underestimates the ability of the common law to assign liability to any of four parties. First, Conrail completely overlooks the potential liability of Eastern Steel Services, Inc., the actual recipient of the freight and presumably one of the parties on whose behalf the freight was shipped.

Second, despite Conrail's arguments to the contrary, Davis Machinery

Company, Inc. ("Davis"), another party on whose behalf the freight was shipped, may well be liable. Conrail cites Payment of Detention Charges, Eastern Central States, 335 I.C.C. 537 (1969), aff'd sub nom. Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (D.D.C. 1972) ("Eastern Central States") for the proposition that Davis cannot be held liable. Petition for Certiorari at 17. However, Eastern Central States held only that an entity which is not otherwise a party to the shipping contract cannot be held liable for detention charges. It did not hold that a party is insulated from liability merely because it is identified in shipping documents as the party to be billed. Davis's liability would therefore turn

upon facts which were not part of the record below. For example, if it requested FMC Corporation ("FMC"), the shipper, to ship the crane to Eastern Steel Services, Inc., or if it otherwise, by express agreement or knowing acquiescence in FMC's designation of Davis as the party responsible for freight charges, assumed an obligation to pay, there is nothing in Eastern Steel Services which would relieve it from liability.[1/]

[1/] Indeed, by placing emphasis on the requirement that an entity be a "party to the contract of transportation" in order to be held liable for detention charges, 335 I.C.C. at 542, Eastern Central States lends support to the holding of the SJC that liability for freight charges is a matter of contract law.

(Footnote Continued On Next Page)

Third, it is at least conceivable that FMC represented to Conrail that Davis assumed the obligation to pay. Again, the record is silent on this question. If such a representation had been made and was in fact false, FMC might be liable under a common law theory of misrepresentation, notwithstanding its having executed the "non-recourse clause" on the bills of

---

2/ (Footnote Continued From Previous Page)

Moreover, in affirming the decision by the Interstate Commerce Commission, the district court expressly adopted the Commission's conclusion that Section 223 of the Interstate Commerce Act, 49 U.S.C. §323, which is the provision relied upon by Conrail, is a "nonliability" provision which "in no way can be read to impose liability on an agent not a party to the contract." 353 F. Supp. at 1120.

lading. For present purposes, it is sufficient to state that the record does not affirmatively support Conrail's contention that FMC is absolved from all liability.

Finally, as noted in the Agreed Statement of Facts, at paragraph 19, Conrail made a demand on Oxhandler Structural Enterprises, Inc. ("Oxhandler"). Again, the record is silent on Oxhandler's role, but it is conceivable that Oxhandler was a freight forwarder who, by express agreement or by conduct sufficient to imply a contract, agreed to pay the freight charges. The point again is simply that it cannot be determined, based upon the record below, whether Oxhandler or, indeed, some other entity not named at all in the Agreed

Statement of Facts, assumed an obligation to pay. In short, Conrail cannot sustain its assertion, based upon the present record, that it "is powerless to avoid the imposition of the penalties provided for violations of the Interstate Commerce Act." Petition for Certiorari at 18.

CONCLUSION

For all of the foregoing reasons, Conrail's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ZACHARY R. KAROL*
WILLIAM N. BERKOWITZ

BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

Counsel for Hallamore Motor Transportation, Inc.

*Counsel of Record